

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

ORIGINAL

In the Matter of )  
 )  
1998 Biennial Regulatory Review- )  
Streamlining of Mass Media Applications, )  
Rules, and Processes )

MM Docket No. 98-43

RECEIVED

JAN 19 1999

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

To: The Commission

PETITION FOR RECONSIDERATION

Equity Broadcasting Corporation and Louis Martinez ("Petitioners"), licensees and permittees of a number of low power television ("LPTV") stations, by their attorneys, hereby submit this Petition for Reconsideration of the *Report and Order* in the above-referenced proceeding. In the *Report and Order*,<sup>1</sup> the Commission adopted a new policy providing a firm three year period for all construction permits for broadcast stations (the "New Rule").<sup>2</sup> Under this policy, construction permits would expire three years after they are granted.<sup>3</sup> The Commission provided that the running of the three year period would be tolled in certain extremely limited situations. What is critical for Petitioners and the basis of this Petition is the fact that this New Rule will be applied to all outstanding permits, not just to permits granted after the New Rule was announced.

---

<sup>1</sup> *Biennial Regulatory Review - Streamlining of Mass Media Applications, Rules, and Processes, Report and Order*, MM Docket 98-43, FCC 98-281 (released November 25, 1998) (*Report and Order*).

<sup>2</sup> *Report and Order* at par. 83.

<sup>3</sup> *Report and Order* at par. 89.

249

Indeed, the New Rule may prove disastrous for LPTV. The unique circumstances of LPTV permittees detailed herein calls for the Commission to expand upon the tolling procedures provided under the New Rule. Unless the Commission grants the relief proposed in this Petition, the New Rule will force permittees to forfeit their permits after considerable time and expense has been expended in attempting to develop new local television operations. The Commission must act in the public interest of consumers of LPTV services and provide appropriate relief for low power television broadcasters under the New Rule.

#### **I. The Commission's Existing Extension Procedures for Construction Permits**

In creating the New Rule, the Commission hoped to make uniform a system that allegedly had grown unwieldy. Previously, the Commission established procedures for extending construction permits and, conversely, terminating permits if no appropriate action had been taken by licensees to construct under the permit or if they were unable to do so for reasons beyond their control. Upon the filing of an application, extensions were granted when a permittee could show that: (i) construction was complete and an application for a license for the facility was to be promptly filed; (ii) broadcast facilities covered by the construction permit had been substantially built; (iii) or that an event outside of the control of the permittee had prevented the completion of construction despite the permittee's diligent efforts.<sup>4</sup> Further extensions could be obtained if the permittee was able to make similar showings. Additionally, permits were often extended when the permit was assigned or when the facilities specified in the permit were modified.<sup>5</sup> Under the

---

<sup>4</sup> 47 C.F.R. §73.3534(b) (1998).

<sup>5</sup> *Report and Order* at pars. 84-85.

Commission's existing rules,<sup>6</sup> construction permits were not terminated when the expiration date passed. Instead, the Commission was required to take affirmative action to extinguish the permit.<sup>7</sup> While the Commission justifies its new approach with respect to permit extensions in part on the basis of the resources expended to process applications, the fact is that extensions were granted only when the facts warranted relief. Holders of outstanding permits are entitled to have those permits evaluated on the basis of those established standards and policies, and not be subjected to a new less-feasible test in mid-course.

Under the New Rule, the Commission created a uniform three year construction period for all permittees, limited the circumstances under which permittees could seek extensions through strict tolling periods, and replaced its approach to the expiration of permits by automatically terminating permits if construction is not completed within three years. The New Rule only includes time during which the permit is "unencumbered;" during periods when the permit is encumbered, the running of the three years is tolled. However, only two limited circumstances will encumber the permit - "acts of God" and administrative or judicial litigation that prevents construction from proceeding (the "Encumbrance Standard"). Acts of God are interpreted very narrowly by the Commission. They encompass natural disasters that halt construction; such as floods, tornadoes, and hurricanes. The permit expiration date will only be tolled for the length of time a diligent permittee would need to recover from the effects of the disaster, which the Commission has determined to be six months. Litigation as an intervening event that tolls the

---

<sup>6</sup> The New Rule becomes effective on February 16, 1999.

<sup>7</sup> *Report and Order* at fn 149.

expiration of a permit is limited to Commission reconsideration of one of its own orders, judicial review of a Commission decision, or any judicial or administrative litigation that relates to the authority to construct a station. The Commission will no longer consider any other circumstances, including circumstances beyond the permittee's control, such as problems in obtaining zoning for a site or delays in Commission action on modification applications.<sup>8</sup>

## **II. The Unique Circumstances of LPTV Permittees**

While the Commission's goal of seeking to control the number of extension applications is understandable, the New Rule as it stands has the potential to cripple the LPTV industry. Because of the unique filing procedures that affect LPTV, the displacement LPTV stations confront as a secondary service in the DTV proceeding, and the uncertain status of the Commission's auction rules, LPTV permittees have been placed in an untenable situation with the advent of the New Rule. As a result, many LPTV permittees will face cancellation of their permits under the New Rule, despite the reasonable expectations that they would be able to secure additional time to construct under the Commission's existing rules and policies.

The LPTV service has unique filing procedures. Applications for new stations and major modifications to existing licenses or permits must be filed only within a filing window set by the Commission. What makes these filing windows unique is that there have only been two such windows in the past five years, one in 1994 and one in 1996, and the windows only last for one week. Because of the significant development of the LPTV industry, these filing windows

---

<sup>8</sup> Generally, Petitioners do not challenge the Commission's decision to adopt a new standard for permits granted after the effective date of the New Rules. Rather, their concern is with the retroactive application of the New Rule to outstanding construction permits, particularly permits involving LPTV stations for the reasons set forth herein.

generated an extremely large volume of applications, and the Commission still has been unable to act on all of the applications seeking major modifications to outstanding construction permits. Thus, there are a number of construction permits that have been extended under the current rules pending Commission action on applications filed in the 1994 and 1996 filing windows, but which now face termination under the New Rule. Additionally, LPTV permittees who discovered that they must file a major change application after the 1996 window have been unable to do so because no new filing window has opened.

In the DTV proceedings, LPTV permittees, as a secondary service, have been displaced from their authorized channels as the Commission allotted channels for the transition of full power television stations from NTSC to digital operations (the "DTV Table").<sup>9</sup> With the creation of the DTV Table, affected LPTV permittees were on notice that they would be displaced during the digital transition. Additionally, all broadcast stations operating on Channels 60-69 were to be displaced from those channels to further the Commission's goals of implementing DTV.<sup>10</sup> The Commission provided that LPTV permittees (and licensees) could file displacement applications

---

<sup>9</sup> The DTV Table went through several revisions. The most current version is published with the *Further Order on Reconsideration of the Sixth Report and Order*. See *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, Sixth Report and Order, Appendix B*, MM Docket No. 87-268, FCC 97-115 (released April 21, 1997) (*Sixth Report and Order*), *Memorandum Opinion and Order on Reconsideration of the Sixth Report and Order, Appendix B*, MM Docket No. 87-268, FCC 98-24 (released February 23, 1998) (*MO&O*), and *Second Memorandum Opinion and Order on Reconsideration of the Fifth and Sixth Reports and Orders, Appendix B*, MM Docket No. 87-268, FCC 98-315 (released December 18, 1998) (*Further Reconsideration MO&O*).

<sup>10</sup> *MO&O* at par. 26.

after the *MO&O* was released in February 1998 in order to move to a new channel consistent with the DTV Table.<sup>11</sup>

Finally, all pending mutually exclusive LPTV applications, whether filed during windows or as displacement applications, are in limbo until the broadcast auction rules have been finalized.<sup>12</sup> LPTV applications filed during the 1994 or 1996 filing windows or any LPTV displacement applications filed during the DTV conversion that are mutually exclusive are not being granted by the Commission.

These situations are beyond the LPTV permittee's control and depend upon further action by the Commission. Faced with this uncertainty, many LPTV permittees elected to postpone constructing under their outstanding permits until the Commission acts on their pending modification applications. In the three situations discussed above, the LPTV permittee is placed in an untenable position. It could not afford to construct a station on a channel that would be modified once the Commission acts on a pending application. While the pendency of a related application has generally served as good cause to extend a permit under the old rules, the New Rule would impose the Draconian measure of loss of the permit even though the reason for the loss is the failure of the Commission to act. This is manifestly unfair to the holders of outstanding LPTV permits.

---

<sup>11</sup> *MO&O* at par. 118.

<sup>12</sup> *Implementation of Section 309(j) of the Communications Act - Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses; Reexamination of the Policy Statement on Comparative Broadcast Hearings; and Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, MM Docket No. 97-234, GC Docket No. 92-52 and GEN Docket No. 90-261, respectively, *First Report and Order*, FCC 98-194 (released August 18, 1998) (*Broadcast Auction Order*).

None of the three circumstances noted above is encompassed by the Encumbrance Standard under the New Rule. Without the relief requested herein, holders of many outstanding LPTV permittees may discover that their permits have already expired under the New Rule while they have been waiting for Commission action. For these reasons, it is obvious that the New Rule must be tailored to fit the unique circumstances confronting LPTV permittees.

### **III. Three Reasonable Tolling Procedures That Would Benefit LPTV Permittees**

In order to ensure that current LPTV permittees have an opportunity to survive the Commission's revisions of its construction permit process, tolling provisions must be created that are designed for the special circumstances of LPTV. The addition of three new tolling provisions to the Encumbrance Standard would provide appropriate and warranted relief to the problems confronting LPTV permittees.

The first tolling provision would account for the time an application is pending at the Commission while the broadcast auction rules remain uncertain. Permittees should not be penalized under one policy because the Commission is seeking to finalize action under another policy. The "Broadcast Auction Rule Tolling Period" would begin from the date an application became mutually exclusive and end when the Commission finalizes the broadcast auction rules.

The second tolling period would account for the time a permittee was unable to build under its construction permit because of some circumstance beyond its control, such as losing its transmitter site, but was prohibited from filing a major change application because there was no LPTV filing window. This "Filing Window Tolling Period" would encompass the time when the circumstance necessitating the major change arose until the Commission announces a new filing

window for LPTV.<sup>13</sup> This tolling period would only encompass circumstances necessitating a major change application that occurred after the 1996 filing window.

The third tolling provision would account for the time a permittee is unable to build under a permit while its displacement application remains pending. The "Displacement Tolling Period" would start from the release of the final DTV Table in the *Further Reconsideration MO&O* until an LPTV permittee's displacement application is granted by the Commission.<sup>14</sup> Additionally, the Commission should allow LPTV permittees the new full three years to construct their LPTV facilities after the displacement application is granted, since this is, in effect, the equivalent of the initial grant of a construction permit. The newly granted displacement application would then be subject to the standards of the New Rule. The Displacement Tolling Period would only be available to those LPTV permittees who file a displacement application before February 16, 1999, the date the New Rule goes into effect. This would ensure that there is some limit placed on the Displacement Tolling Period and also reward LPTV permittees who file their displacement applications diligently.

---

<sup>13</sup> Often broadcast service permittees would be able to file a modification application as soon as circumstances necessitated; only LPTV permittees are required to wait for a filing window, an obviously unfair situation.

<sup>14</sup> This is assuming that the DTV Table is not further amended, subsequently causing further displacement of LPTV permittees.



### Conclusion

For the above reasons, the Petitioners respectfully request that the Commission reconsider its decision in the *Report and Order* and, upon reconsideration, adopt the three proposed additional tolling criteria for LPTV broadcasters under the New Rule as proposed herein.

Respectfully submitted,

**EQUITY BROADCASTING CORPORATION**

**LOUIS MARTINEZ**

By: 

Peter Tannenwald, Esquire

Alan C. Campbell, Esquire

Nathaniel Hardy, Bar Admission Pending

Irwin, Campbell & Tannenwald, P.C.  
1730 Rhode Island Avenue, N.W.  
Suite 200  
Washington, D.C. 20036-3101  
(202) 728-0400 (phone)  
(202) 728-0343 (fax)

January 19, 1999